UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON et al.	:	Case No.: C-1-01-528
Plaintiffs,	:	Judge Spiegel
v.	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO et al.	:	
Defendants.	:	

MOTION FOR SUMMARY JUDGMENT OF JONATHAN TOBIAS, M.D., ON GROUNDS OF QUALIFIED IMMUNITY

Pursuant to Federal Rule of Civil Procedure 56, Defendant Jonathan Tobias, M.D. respectfully requests that this Court grant him summary judgment on all remaining claims on the grounds that no genuine issue of material fact remains on the question of liability and that he is entitled to qualified immunity. A memorandum in support is attached hereto.

Respectfully submitted,

/s/ Glenn V. Whitaker

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MEMORANDUM IN SUPPORT

I. PRELIMINARY STATEMENT

In their complaint, Plaintiffs accuse Defendant Jonathan Tobias, M.D. of violating their due process and equal protection rights by allowing Defendant Thomas Condon to view, manipulate, pose, and photograph the body of their brother, Perry Melton, while it was at the Hamilton County Coroner's Office. Plaintiffs also accuse Dr. Tobias of "abusing" the corpse himself. Discovery in this case has proven these accusations to be false. Mr. Condon never saw or even was in the same room as Perry Melton's body. He never posed it, photographed it, or manipulated it. Indeed, the only contact that Dr. Tobias had with Mr. Melton's corpse was to take one photograph of the body and develop a handful of prints from that photograph at Mr. Condon's photography studio.

Plaintiffs have suffered no constitutional violation. It was Dr. Tobias's job as a pathology fellow at the Coroner's Office to photograph bodies prior to their autopsy. The photo he took of Mr. Melton's body was destined for the official Coroner's Office file on Mr. Melton. His decision to make prints of the photograph at Mr. Condon's studio was dictated by necessity, because the Coroner's Office did not have the equipment necessary to make prints on-site. His actions were sanctioned by his supervisors, who knew he was developing official photographs at Mr. Condon's studio and who themselves had used commercial developers in the past. Dr. Tobias did nothing wrong. He is entitled to summary judgment.

But even if Plaintiffs could make out some constitutional violation based on the factual record, which he cannot, Dr. Tobias respectfully requests that this Court find him entitled to qualified immunity. "Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." Saucier v. Katz, 533 U.S. 194, 200-01 (2001). The defense is dispositive here. The rights that Dr. Tobias allegedly violated are not clearly-established. There is no way Dr. Tobias could have known that what he did was a constitutional violation. And now, Plaintiffs want to consolidate this lawsuit with another, involving far different and more complex facts. Dr. Tobias has defended this lawsuit for nearly three years. The lawsuit lacks merit, and he is entitled to relief from the burden of defending it now. He urges this Court to grant him that relief.

II. FACTUAL BACKGROUND

A. Dr. Tobias Is Trained As A Pathologist To Document His Findings In Photographs.

Defendant Jonathan Tobias, M.D. received his undergraduate degree in mathematics from the University of California-Los Angeles in 1993. (See Deposition of Jonathan Tobias, M.D. in the case of Chesher v. Neyer, C-1-01-566 ("Tobias depo. I") at 23:11-19.)[1] He graduated in 1998 from the University of California-Davis with a doctoral degree in medicine. (Tobias depo. I at 23:20-21.) After that, he spent one year in a pathology residency program at UCLA before returning to Cincinnati to continue his residency at the University of Cincinnati Medical Center. (Tobias depo. I at 24:8-17.)

On July 1, 2000, Dr. Tobias began a fellowship at the Hamilton County Coroner's Office. (Tobias depo. I at 26:8-10.) As a fellow, Dr. Tobias was expected to learn forensic pathology and "to do the job" of the pathologists at the Coroner's Office. (Tobias depo. I at 26:11-22; Affidavit of Jonathan Tobias ("Tobias aff.") ¶ 2, exhibit 3 to Tobias depo. II.) His

[1] The parties to this lawsuit have stipulated that all depositions taken in Chesher may be filed and used in this case. (Deposition of Jonathan Tobias, M.D. in the instant case ("Tobias depo. II") at 6:1-7:1.)

duties included performing autopsies and visiting death scenes. (See Tobias depo. I at 27:15-29:1.)

During his residency and before becoming a fellow at the Coroner's Office, Dr. Tobias learned that because the practice of pathology is very visual, taking photographs before and during autopsies is important to that practice. (Tobias depo. I 43:4-6.) This lesson was emphasized during his fellowship at the Coroner's Office. The other pathologists at the Coroner's Office instructed Dr. Tobias "to take lots of photographs." (Tobias depo. I at 34:16-17; 35:4-9.) While visiting death scenes, Dr. Tobias was expected to take photographs of the scene and the body in order to document any injuries or the lack of injuries. (Tobias depo. I at 29:16-20.)

Dr. Tobias also learned as a fellow to take photographs before autopsies in all injury cases. (Tobias. depo. I at 43:24-2.) One of the first things he would do in a case involving a severely traumatized body would be to take photographs of the body in the condition in which it arrived at the Coroner's Office. (Tobias depo. I at 41:10-18.) Then, any clothes would be taken off the body and more photographs taken. (Tobias depo. I at 42:2-15.) Dr. Tobias would then wash the body to remove any blood or dirt and then take more photographs in order to document the injuries. (Tobias depo. I at 43:17-23.) The body then would be rolled onto its stomach and any injuries on its back photographed. (Tobias depo. II. at 44:11-14.) During the autopsy, Dr. Tobias would take photographs to document any unusual findings. (Tobias depo. I at 45:9-11.)

B. Dr. Tobias Takes A Single Photograph Of Perry Melton's Body To Include In The Official Files Of The Coroner's Office.

Perry Melton died in an industrial accident on November 9, 2000, during which he suffered severe trauma to his entire body, including his head and upper torso. Mr. Melton's body was transported to the Hamilton County Coroner's Office late the same afternoon, where it awaited autopsy.

Because he often conducted the autopsies in cases involving severe trauma, Dr. Tobias thought that he would conduct the autopsy on Mr. Melton's body the next day. (Deposition of Jonathan Tobias, M.D. in the instant case ("Tobias depo. II") at 15:4-19.) Thus, in preparation, Dr. Tobias went down to the "cooler" to examine the body. (Tobias depo. II at 15:24-16:13.)

At that time, Dr. Tobias was using a Bronica medium-format camera, which he had borrowed from the Coroner's Office, to take work-related photographs. (Tobias depo. I at 169:9-170:12.) He used the Bronica because he found that the digital cameras used by the other pathologists created photographs of insufficient quality. (Tobias depo. I at 169:17-170:12.) Dr. Tobias was planning to develop the roll of film in the Bronica that evening and knew that only one exposure remained on the roll. (Tobias depo. I at 109:14-20.) He thought that the Melton case would be interesting and decided to use the last exposure on the roll to take a picture of Mr. Melton's body. (Tobias depo. I at 109:14-22.) He intended to place one copy of the photograph in the Coroner's Office files and another in his teaching file. (Tobias depo. I at 117:4-12.)

Dr. Tobias found Mr. Melton's body on a gurney in the "cooler" at the Coroner's Office. He pulled back the body bag to reveal Mr. Melton's head and upper torso and took a picture of Mr. Melton's head. (Tobias depo. II at 17:8-14; Tobias depo. I at 109:11-13.) Dr.

Tobias then closed the body bag and went home, where he developed negatives from the roll of film. (Tobias depo. II at 19:1-15; Tobias depo. I at 111:17-20.) The next day, Dr. Tobias arrived at the Coroner's Office to find Defendant Dr. Pfalzgraf conducting the autopsy of Mr. Melton. (Tobias depo. I at 119:23-120:2.) Dr. Tobias had no further contact with Mr. Melton's body.

Defendant Thomas Condon never came in contact with Mr. Melton's body and was not at the Coroner's Office on any of the days during which Mr. Melton's body was housed there. (Tobias depo. II at 119:4-7; 121:11-17; Tobias aff. ¶ 8.)

C. With The Approval Of His Supervisors, Dr. Tobias Develops The Melton Photograph At The Studio Of Professional Photographer Thomas Condon.

The Coroner's Office did not have the equipment necessary for Dr. Tobias to make prints of any photographs that he took with the Bronica camera. (Tobias depo. II at 132:14-19.) Thus, Dr. Tobias developed prints of the photographs that he took with the Bronica camera at the studio of Mr. Condon, a professional photographer. (Tobias depo. I at 168:4-169:8.) Dr. Tobias told his supervisors at the Coroner's Office of his intention to develop official crime scene and other photographs that he took with the Bronica camera at Mr. Condon's studio. (Tobias depo. II at 86:17-24; Tobias depo. I at 169:6-8.) His supervisors told him that this would be "okay." (Tobias depo. II at 85:17-24.) Indeed, Defendants Terry Daly and Dr. Utz had developed autopsy photos at commercial laboratories in the past. (Tobias depo. II at 127:9-128:6; 144:14-145:3.) However, Dr. Tobias felt uncomfortable about dropping off his official photographs at "any old developing place," so instead he used Mr. Condon, "who was trusted by the Hamilton County Coroner's Office." (Tobias depo. I at 168:17-169:5.)

With his supervisors' approval, Dr. Tobias took the negative that he had made of the Melton photo to Mr. Condon's studio. (Tobias depo. I at 112:1-7.) Using Mr. Condon's equipment, Dr. Tobias made a handful of prints of the single Melton photograph. (Tobias depo. II at 29:22-30:2.) After making the prints, Dr. Tobias left them at Mr. Condon's studio to dry and to undergo a final process called "toning," which would stabilize the image on the paper. (Tobias depo. I at 116:8-12.) Mr. Condon did the "toning" process in batches and represented to Dr. Tobias that he would include the Melton prints in the next batch that he did. (Tobias depo. I at 116:8-12.)

Before Dr. Tobias's Melton prints underwent the "toning" process, the Cincinnati Police Division searched Mr. Condon's studio and confiscated Dr. Tobias's prints. Those prints form the basis of this lawsuit.

III. LAW AND ANALYSIS

The doctrine of qualified immunity provides "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To determine if qualified immunity attaches, a court first must examine whether the facts, taken in the light most favorable to the plaintiff, show that the defendant's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). If they do not, then the inquiry need not continue, as the defendant is entitled to prevail on the merits of the plaintiff's claim. Id.

However, if the facts show a possible constitutional violation, then the court next must inquire whether the violated right was clearly established. See id. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. "Indeed, the right must be 'so clearly established when the acts were committed that any officer in the defendants' position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.'" Akers v. McGinnis, 352 F.3d 1030, 1042 (6th Cir. 2003) (quoting Dominque v. Telb, 831 F.2d 673, 676 (6th Cir.1987)) (emphasis in original). Thus, a government official may be entitled to qualified immunity even if he did in fact violate the constitution, so long as he made a reasonable mistake as to what the law allowed. See Saucier, 533 U.S. at 205.

In this case, the record shows that Dr. Tobias took a photo of Mr. Melton's body and left prints of that photo at Mr. Condon's studio for completion of the development process. These actions did not violate Plaintiffs' constitutional rights. Moreover, the rights that Plaintiffs allege that Dr. Tobias violated were not so clearly-established that any reasonable person in Dr. Tobias's position would have clearly understood that what he did was improper. Therefore, Dr. Tobias is entitled to qualified immunity.

A. Dr. Tobias Did Not Commit Any Constitutional Violation.

Plaintiffs claim that Dr. Tobias violated both their substantive and procedural due process rights, as well as their right to equal protection. However, in the light of the undisputed factual record, Plaintiffs cannot establish that Dr. Tobias committed any constitutional violation. Therefore, Dr. Tobias is entitled to summary judgment.

1. Dr. Tobias's Actions Did Not Violate Plaintiffs' Substantive Due Process Rights.

The Fourteenth Amendment sets both procedural and substantive limits on Government action. See County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998). In the context of the actions of individual officials, substantive due process limits protect against "abuse of power" that "shocks the conscience." Id. at 846; see also Braley v. City of Pontiac, 906 F.2d 220, 225 (6th Cir. 1990) ("If appellant's § 1983 claim is construed to be based on an alleged violation of substantive due process, then the claim must be based either on a violation of an explicit constitutional guarantee (e.g., a fourth amendment illegal seizure violation) or on behavior by a state actor that shocks the conscience."). However, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." DeShaney v. Winnebago County Dep't of Social Servs., 489 .S. 189, 202 (1989). Rather, government action violates substantive due process protections only to the extent that it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." Collins v. City of Harker Heights, Tex., 503 U.S. 115, 128 (1992).

"[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." Lewis, 523 U.S. at 848. Rather, to "shock the conscience," Government action must entail something more than mere negligence. See id. at 849 ("liability for negligently inflicted harm is categorically beneath the constitutional due process threshold"). Indeed, "conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." Id.; see Sperle v. Michigan Dep't of Corrections, 297 F.3d 483, 491 (6th Cir. 2002).

In light of the record, neither Dr. Tobias's taking of a photograph of Mr. Melton's body nor his use of Mr. Condon's studio to develop prints of that photograph rises to the level of a substantive due process violation. As an initial matter, Dr. Tobias's actions were not intended to harm Plaintiffs. On the contrary, the production of pre-autopsy photographs to be included in Mr. Melton's official autopsy file was part of Dr. Tobias's duties as a pathology fellow. Photographs of Mr. Melton's body prior to autopsy were particularly important because the trauma to Mr. Melton's body was so unique and severe. Such photos helped advance the

Coroner's Office's interest in determining the cause of Mr. Melton's death. See Ohio Rev. Code § 313.15 (setting forth coroner's responsibility "to decide on a diagnosis giving a reasonable and true cause of death").

Not only were Dr. Tobias's actions not intended to harm Plaintiffs, but in light of the circumstances, they were perfectly reasonable. Dr. Tobias used the Bronica camera because it produced far higher quality photographs than the digital camera equipment used by others at the Coroner's Office. However, the Coroner's Office did not have the equipment necessary to develop prints from the Bronica photos. Thus, Dr. Tobias had to go elsewhere to get prints made. Instead of using commercial photography laboratories, as other pathologists had done in the past, Dr. Tobias felt more comfortable making prints at Mr. Condon's studio because Mr. Condon was trusted by the Coroner's Office. Tobias's supervisors approved of this arrangement, so Dr. Tobias had no reason to doubt its propriety.

Based on these facts, Dr. Tobias's actions do not rise anywhere near the level of government action that courts have previously found to be conscience-shocking. Compare Rochin v. California, 342 U.S. 165, 172 (1952) (forced stomach pumping of individual suspected of possession of drugs violates due process); Farley v. Farley, 225 F.3d 658 (table), 2000 WL 1033045, at **6-7 (6th Cir. July 19, 2000) (violation of substantive due process where government officials refused to return children to mother and ignored mother's right to immediate physical custody of her children) (attached hereto as exh. A) with Saylor v. Bd. of Educ. of Harlan County, Ky., 118 F.3d 507, 514, 516 (6th Cir. 1997) (holding that physical discipline of student in violation of school regulations did not shock the conscience and that, even if it did, defendant entitled to qualified immunity because right not to be subject to physical discipline in violation of school regulations not clearly-established). Therefore, Dr. Tobias is entitled to summary judgment on Plaintiffs' substantive due process claim.

2. Dr. Tobias Did Not Deprive Plaintiffs Of Any Property Right Without Due Process.

Plaintiffs must satisfy three prerequisites to assert a valid due process claim: "(1) deprivation, (2) of property, (3) under color of state law."[2] See Brotherton v. Cleveland, 923 F.2d 477, 479 (6th Cir. 1991). In denying Defendant Condon's motion to dismiss Plaintiffs' complaint, this Court held that Plaintiffs had alleged sufficient facts to establish the violation of two property rights: (1) an exclusive right to determine how Mr. Melton's body would be handled; and (2) a right to privacy in Mr. Melton's body. (See doc. #66.) In light of the factual record, it is now clear that Dr. Tobias did not interfere with any constitutionally-recognized property right held by Plaintiffs. Plaintiffs' procedural due process claims therefore should be dismissed.

a. Dr. Tobias Did Not Interfere With Any Constitutionally-Cognizable Possessory Right.

The due process clause protects only those property interests to which one has a "legitimate claim of entitlement." Brotherton v. Cleveland, 923 F.2d 477, 479 (6th Cir. 1991) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Property interests protected by the due process clause "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." Roth, 408 U.S. at 577. Consequently, whether Plaintiffs' interest in not having photos taken of Mr. Melton's body rises to the level of a

[2] Plaintiffs also must show either: "(1) the conduct was caused by established state procedure rather than random and unauthorized action, or (2) the means of redress for property deprivations provided by the state of Ohio fail to satisfy the requirements of procedural due process." See Brotherton, 923 F.2d at 479 (citations omitted).

"legitimate claim of entitlement" is determined by Ohio law. See Brotherton, 923 F.2d at 479 (citing Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 9 (1978)).

Ohio law undeniably recognizes that a family member has a "possessory interest" in the corpse of a relative. See Brotherton, 923 F.2d at 482; Everman v. Davis, 561 N.E.2d 547, 550 (Ohio Ct. App. 1989) (citing Ohio Rev. Code § 313.14). This interest has been held to give rise to a "legitimate claim of entitlement" of family members in the physical body of their relative. See Brotherton, 923 F.2d at 482. However, this possessory interest, and the resulting "legitimate claim of entitlement," must be construed consistently with, and is limited by, the statutory duties imposed on the coroner by the Ohio Revised Code. See Everman, 561 N.E.2d at 550 (noting that while family has possessory right in corpse, "this is not to say that a corpse may not be temporarily held for investigation as to the true cause of death").

Ohio law requires that each county elect a coroner. Ohio Rev. Code § 313.01. "It is the duty of the coroner to determine the reasonable and true cause of death." Everman, 561 N.E.2d at 549. This coroner may appoint deputy coroners who "shall assist in doing autopsies, make pathological and chemical examinations, and perform other duties as directed by the coroner or recommended by the prosecuting attorney." Ohio Rev. Code § 313.05(A) (emphasis added). Upon being notified of a violent, suspicious, unusual, or sudden death, see Ohio Rev. Code § 313.12, the coroner, deputy coroner, "or any other person the coroner designates" may "take charge" of the dead body. Ohio Rev. Code § 313.13. If the coroner or deputy coroner decides that an autopsy is necessary to determine the cause of death, "[t]he coroner, deputy coroner, or pathologist shall perform an autopsy." Ohio Rev. Code § 313.131 (emphasis added). The coroner must then maintain custody over the body "until such time as the coroner, after consultation with the prosecuting attorney, or with the police department . . ., has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving reasonable and true cause of death, or to decide that such body is no longer necessary to assist any such officials in his duties." Ohio Rev. Code § 313.15. Any records created by the coroner or his subordinates are public records, which may be used as evidence in any civil or criminal matter and must be open to public inspection. Ohio Rev. Code § 313.10.

These statutes limit a family member's property interest under Ohio law in the body of a deceased relative. For instance, a family's discomfort with an autopsy being done and possessory right in the body does not permit the family to interfere with a coroner's duty to perform the autopsy. See Everman, 561 N.E.2d at 549-550. Similarly, a private party, working at the behest of a coroner, need not get permission from the next-of-kin before performing tests on a corpse. Hicks v. NLO, Inc. 631 F. Supp. 1207, 1210 (S.D. Ohio 1986). Moreover, Ohio law provides a coroner with limited immunity in the performance of his discretionary duties. Everman, 561 N.E.2d at 549 ("in the absence of bad faith or corrupt motive [a coroner] is protected by limited immunity from ordinary civil liability"). This immunity extends to any agent of the coroner assisting him in the performance of his official duties. See Hicks v. NLO, Inc., 631 F. Supp. 1207, 1210 (S.D. Ohio 1986) ("From our analysis of the statutes, we think it plain that defendant HEHF, acting as it did at the Coroner's behest, should share the latter's protection from suit.") Thus, under Ohio law, the statutory duties of the coroner trump the possessory interest of the family. It follows from Brotherton that the constitutionally-cognizable property interest that a family member has in her relative's body also is limited by the coroner's statutory duties.

Because Dr. Tobias was acting in furtherance of the Hamilton County Coroner's duties, he did not interfere with any constitutionally-cognizable property interest held by

Plaintiffs. Dr. Tobias's supervisors at the Coroner's Office instructed him to photograph corpses prior to autopsy. And of course, that instruction would be meaningless if he were not also expected to have prints made of those photographs so that they could be included in the official Coroner's Office files. Pursuant to these instructions, Dr. Tobias took one photograph of Mr. Melton's body and intended to put one print of that photograph in the official files of the Coroner's Office and keep another in his teaching file.

Thus, Plaintiffs' assertion that they had a constitutionally-protected right to prevent the Coroner's Office from taking photographs of Mr. Melton's body is groundless. Indeed, the recognition of such a right would lead to the absurd result that every time the coroner wished to photograph a body for legitimate purposes before or during an autopsy, the permission of the family would be required. Requiring that such consent be obtained, like requiring consent before running tests on a corpse, would be both "an affront to a coroner's authority and an unnecessary intrusion on the decedent's relatives." Hicks, 631 F. Supp. at 1210.

b. Dr. Tobias Did Not Interfere With Any Constitutionally-Cognizable Privacy Interest Held By Plaintiffs In Mr. Melton's Body.

Just as Dr. Tobias did not interfere with any constitutionally-cognizable property right of Plaintiffs', Dr. Tobias did not interfere with any privacy right held by Plaintiffs when he photographed Mr. Melton's body and developed prints from that photograph. In denying Defendant Condon's motion to dismiss, this Court held that the right to privacy is one of the "bundle of rights" that constitutes the idea of property. (See doc. 66 at 10.) While that may be so,[3] the right to privacy under Ohio law, like the other property rights in the "bundle," must give way to the duties and responsibilities imposed on the coroner by statute. To hold otherwise would lead to the same absurd result noted above, where permission of the family would be required before an autopsy, and the attendant photographing, of a body could proceed.

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[3] While Dr. Tobias disagrees with this ruling and reserves his right to challenge it on appeal, he accepts that it is the law of the case.

This result gains further support from Ohio, which law recognizes that an actionable invasion of privacy claim based on "the unwarranted appropriation or exploitation of one's personality." Housh v. Peth, 133 N.E.2d 340, 341 (Ohio 1956 (syllabus ¶ 2). To establish such a claim, the plaintiff must "produce evidence that the area intruded upon was private, and that the intrusion by the [defendants] was unwarranted and offensive or objectionable to the reasonable man." Contadino v. Tilow, 589 N.E.2d 48, 53 (Ohio Ct. App. 1990).

In this case, the area intruded upon was not private, and the intrusion was warranted, inoffensive, and unobjectionable to the reasonable man. As explained above, the official files of the Coroner's Office are public records, see Ohio Rev. Code § 313.10, and photographs are inevitably a part of those records.[4] Thus, by taking the picture of Mr. Melton's body, Dr. Tobias did not intrude on a private area; rather, he created a public record, as he was required to do. Similarly, his actions were not unwarranted; rather, Ohio law specifically contemplates that a coroner's official record, including photographs, be made public. Finally, because he was assisting the Hamilton County Coroner in complying with Ohio statutory requirements, Dr. Tobias's actions cannot be labeled offensive or objectionable. Consequently, Dr. Tobias did not violate any right to privacy recognized by Ohio law, and Ohio law does not recognize a property right based on the right to privacy in this instance. Because Plaintiffs

[4] Indeed, the use of autopsy photographs in criminal trials has been upheld by the Ohio Supreme Court. See State v. Maurer, 473 N.E.2d 768 (Ohio 1984) (syllabus ¶ 7). Plaintiffs certainly cannot mean to argue that Ohio law recognizes a privacy interest that prevents the taking of such photographs.

cannot establish that Dr. Tobias violated any constitutionally-cognizable property interest, their procedural due process claims fail.

3. Dr. Tobias Did Not Violate Plaintiffs' Equal Protection Rights.

Generously construed, Plaintiffs' complaint could be read to state a claim for violation of the Equal Protection Clause of the Fourteenth Amendment. (See doc. #16 ¶ 92 ("The aforesaid wrongful acts and omissions of all of Defendants . . . constituted a 'taking' and/or conversion of the property rights of the plaintiffs with [*sic*] due process of law and in violation of the equal protection of the losses [*sic*].").) That claim also fails. Traditionally, "[t]o state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 341 (6th Cir. 1990) (citation omitted). Plaintiffs do not allege that they are members of a protected class or that they have been treated differently as the result of such membership. Thus, under the traditional formulation, Plaintiffs' equal protection claim fails.

Plaintiffs may have intended, however, to assert an equal protection claim as a "class of one." See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). In such a claim, "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Id. The evidence does not bear out such a claim. As a matter of practice, the Coroner's Office photographs corpses prior to autopsy. Those photographs end up as part of the official Coroner's Office files and, thus, as a part of the public record. See Ohio Rev. Code § 313.10. The same thing happened, except that the police confiscated the photograph of Mr. Melton before it could be placed in the physical file maintained by the Coroner's Office. Plaintiffs cannot point to any substantive way in which they have been treated differently than other individuals whose deceased relatives have passed through the Coroner's Office. Even under a "class of one" formulation, Plaintiffs' equal protection claim fails.

B. Dr. Tobias Is Entitled To Qualified Immunity Because The Rights That He Allegedly Violated Were Not Clearly-Established.

Even if Plaintiffs can establish a constitutional violation, which they cannot, Dr. Tobias is entitled to qualified immunity because the rights that he allegedly violated are not "clearly established." See Saucier v. Katz, 533 U.S. 194, 202 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. (emphasis added). Specifically, "to find a clearly established constitutional right, a district court within the Sixth Circuit must find binding precedent from the Supreme Court, the Sixth Circuit, or from itself."[5] Cope v. Heltsley, 128 F.3d 452, 459 n.4 (6th Cir. 1997).

The Sixth Circuit's decision in Cagle v. Gilley, 957 F.2d 1347 (6th Cir. 1992), illustrates the level of specificity necessary to establish a right clearly for qualified immunity purposes. In Cagle, the plaintiffs, deputy sheriffs, sued the defendant sheriff, claiming that the defendants had failed to rehire them because they supported his opponent in the sheriff election. The lower court had refused to grant qualified immunity, holding that a government employee's First Amendment right not to be discharged based on political affiliation was clearly established in two Supreme Court cases, Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). The Cagle court reversed, implicitly recognizing that while Elrod and Branti set

[5] While the decision in Cope allows reliance on decisions from other jurisdictions in "extraordinary cases," 128 F.3d at 459 n.4, there are no cases from any other jurisdiction that bear on the issues in this case any more closely than those discussed herein.

forth the general First Amendment right of a government employee not to be discharged based on political affiliation, those cases did not address whether that right applies to deputy sheriffs. The Court held that the right that the plaintiffs alleged to have been violated was not clearly established because no Sixth Circuit or United States Supreme Court decision had yet applied that right in the context of deputy sheriffs. 957 F.2d at 1349.

The Cagle case is instructive because while the general rules governing procedural and substantive due process and equal protection claims have been established authoritatively by the Supreme Court, no decisions from the Supreme Court, the Sixth Circuit, or the Southern District of Ohio clearly established those rights in a situation similar to this case. Thus, no reasonable person in Dr. Tobias's position could have known that, by photographing a dead body in the course of his official duties as a pathology fellow, he was committing the constitutional violations alleged by Plaintiffs. However, Plaintiffs may try to argue that the rights that Plaintiffs allege have been violated were clearly established by two cases: Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991), and Culberson v. Doan, 125 F. Supp. 2d 252 (S.D. Ohio 2000). Plaintiffs would be incorrect.

In Brotherton, the Sixth Circuit addressed a policy by which the Hamilton County Coroner's Office removed and donated corneas from corpses over the objections of family members. The Brotherton court held that the plaintiff had "a 'legitimate claim of entitlement' in [her husband's] body, including the corneas, protected by the due process clause of the fourteenth amendment." 923 F.2d at 482 (emphasis added). The Court relied on Ohio case law that recognized the plaintiff's "possessory right" in her husband's body and permitted a family member to maintain a claim for the disturbance of a relative's body. Id. However, the Sixth Circuit did not address any right beyond the possessory right that the plaintiff had in the physical body of her husband. Specifically, the Court did not examine whether the plaintiff's rights would extend to the creation of a photograph or other likeness of her husband's body. Therefore, Brotherton did not provide notice to Dr. Tobias that his actions might be unconstitutional and did not clearly establish the rights that Plaintiffs are trying to enforce. See Saylor v. Bd. of Educ. of Harlan County, Ky., 118 F.3d 507, 515-16 (6th Cir. 1997) ("'For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.'") (quoting Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)) (emphasis in original).

Similarly, beyond the fact that both involve a dead body, the instant case and Culberson are wholly dissimilar. Culberson found that a government official who took affirmative actions that led to the plaintiffs being deprived of their right to possess and dispose of the corpse of their murdered relative "may have violated [the plaintiffs'] substantive due process." Id. at 270. Culberson also found that the government's failure to prevent the suspected murderer's family from moving the corpse shocked the conscience of the Court. Id. at 272. Here, Dr. Tobias merely photographed Mr. Melton's body in the course of his official duties and made prints of that photograph. There is no way, looking at the decision in Culberson, that it would have been clear to a reasonable person in Dr. Tobias's position that his actions violate Plaintiffs' substantive due process rights. The rights that Dr. Tobias is alleged to have violated are not clearly established. Consequently, Dr. Tobias is entitled to qualified immunity, and the claims against him should be dismissed.

IV. CONCLUSION

For the reasons set forth above, Dr. Tobias respectfully requests that the Court grant summary judgment in his favor on all remaining claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by electronic mail on all counsel of record on this 2nd day of February, 2004.

/s/ Glenn V. Whitaker
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